OEDCA DIGEST

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Office of Employment Discrimination
Complaint Adjudication

Summaries of Selected Decisions Issued by the Office of Employment Discrimination Complaint Adjudication

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent, adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final agency decision on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees.

Also included in this issue is a discussion of EEOC's recent guidance on management's liability for harassment by supervisors and, in particular, the requirements for an effective anti-harassment policy and complaint procedure. In fact, several cases discussed in this issue relate directly to the requirements set forth in EEOC's guidance.

The *OEDCA Digest* is available on the World Wide Web at: *www.va.gov/orm*.

Charles R. Delobe

I

MANAGEMENT'S FAILURE TO CONSIDER AN EMPLOYEE'S REQUEST FOR ACCOMMODATION OF A DISABILITY RESULTS IN *REHABILITATION ACT* VIOLATION.

OEDCA recently adopted an EEOC administrative judge's recommended decision finding disability discrimination due to management's failure to further modify a light duty position.

The complainant, a part-time registered nurse, worked only one day per week. She suffered a work-related injury, which, along with her pre-existing physical condition, left her permanently disabled. She was subsequently diagnosed with major depression caused by the circumstances surrounding her physical injury.

The complainant collected Office of Worker's Compensation benefits for approximately two years. The OWCP subsequently terminated her benefits, determining that she was no longer disabled. Prior to that determination, management officials had ordered the complainant to return to work in a light duty position. The light duty position required, among other things, limited patient care duties, dispensing medication to patients, clinical chart reviews, quality assurance data collection, progress reports, and various other clerical tasks. The complainant requested reasonable accommodation for her disability, stating that she could not perform patient care duties. Additionally, because of the medication she was taking for her depression, she asserted that she could not dispense medication to patients, as she might make an error. She provided medical documentation from her psychiatrist, who confirmed that she was on anti-depressant medication and, hence, should not dispense medication to patients. She subsequently agreed to perform patient care duties, but continued to maintain that she was unable to dispense medication. Management refused to relieve her of that function. The complainant thereafter filed an EEO complaint alleging that management failed to provide her with a reasonable accommodation.

The *Rehabilitation Act of 1973*, 29 U.S.C. Section 791, *et seq*., prohibits discrimination based on disability and requires federal agencies to provide reasonable accommodations to the known physical and mental limitations of qualified persons with disabilities. The EEOC administrative judge determined that the complainant was a qualified individual with a disability within the meaning of the *Rehabilitation Act*. The administrative judge also noted that management did not claim that dispensing medications was an essential function of the complainant's position. In fact, one nurse manager indicated that it might not have been necessary for the complainant to dispense medication. Management provided no explanation for its refusal to further modify the complainant's light duty position with respect to dispensing medication.

The duty to design a reasonable accommodation includes an individualized assessment of an employee's impairment, which takes into account the nature of the employee's disability, qualifications, and possible accommodations. Here, there was no evidence that man-

agement ever inquired into the feasibility of providing an accommodation, such as having other nurses on the ward dispense medication on the one day per week that she worked. Accordingly, OEDCA accepted the administrative judge's finding that management failed to make a good faith effort to accommodate the complainant's disability, as required under the *Rehabilitation Act*. OEDCA therefore ordered the department to provide the complainant with make-whole and other appropriate relief.

II

REQUEST BY VICTIM OF SEXUAL HARASSMENT THAT MANAGEMENT NOT CONFRONT THE HARASSER DOES NOT EXCUSE MANAGEMENT FROM INVESTIGATING THE MATTER

(Although this EEOC decision does not involve the VA, we are including it in the OEDCA Digest because the decision is significant, and one that all VA supervisors and managers should be aware of.)

An employee of the Social Security Administration (SSA) had informed a management official that a team leader who exercised supervisory authority over her had been sexually harassing her for almost a year. The official advised her that he would immediately speak to the alleged harasser. However, the employee insisted that the official not speak to the harasser. The official consented to her request and took no action on the matter other than to "monitor" the situation and ask the complainant to report any further problems.

The harassment continued for another six months, at which point the employee again complained. This time management officials confronted the harasser, who admitted that the employee's allegations were true. The harasser was thereafter disciplined and transferred.

Notwithstanding the eventual discipline and transfer of the harasser, the EEOC found management liable, as it failed to take prompt and effective action when the employee first reported the harassment. Management, of course, argued that, in honoring the complainant's initial request not to confront the harasser, it was effectively precluded from taking prompt and appropriate action.

The Commission acknowledged that its recently issued guidance on employer liability for sexual harassment requires employers to keep harassment allegations confidential to the extent possible.[1] The guidance, however, also recognizes that an employer's obligation to effectively investigate such allegations will inevitably result in certain information being revealed to the alleged harasser and potential witnesses, and "while it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment." Thus, the Commission concluded that management had an obligation to investigate, even if that meant questioning the harasser.

Moreover, in this particular case, the EEOC found that SSA management could have taken steps to address the

[1] See the article that begins on page 11 for a discussion of EEOC's guidance on this topic.

situation without involving the harasser. Some examples the EEOC gives include talking to the harasser's superiors, questioning other employees about the harasser's behavior, and reaffirming to all employees that sexual harassment is illegal and will not be tolerated. As SSA management did none of these things, thereby allowing the harassment to continue for an additional six months, it was unable to assert an affirmative defense against the employee's claim. The EEOC therefore found in the employee's favor.

III

NO *EQUAL PAY ACT* VIOLATION WHERE COMPLAINANT WAS NOT DOING WORK EQUAL TO THAT OF A HIGHER GRADED MALE WORKER

OEDCA recently adopted an EEOC administrative judge's finding that the complainant was not discriminated against due to her gender because she was being paid less than a male co-worker.

The complainant, a GS-5 Claims Clerk, alleged that she was not given the appropriate grade for the level of work she was performing, which she claimed was at the same level as a male co-worker who was a GS-6. The male co-worker was a Patient Services Assistant (PSA). According to the record, while some of their duties were similar, the higher graded PSA job had more administrative duties than that required of a Claims Clerk. In addition, the PSA was expected to work independently, and at a higher level of responsibility than a Claims Clerk. Management officials testified that the PSA was expected to act as the lead in the unit and had overall responsibility for the smooth operation of the unit. Finally, they testified that another major difference between the two positions was that the PSA was responsible for reviewing examination reports for completeness and releasing cases to the regional office.

The complainant did not deny these differences in responsibility. In fact, her testimony tended to confirm them. For example, she admitted that she only released cases to the regional office in the PSA's absence. In addition, she appeared to be arguing that when she had to cover for the PSA in his absence, she would have to assume more responsibility, not just more work. This tends to confirm that the two jobs, though similar in some respects, were different in terms of the level of responsibility. Finally, the record showed that after the PSA left on extended medical leave, and the complainant had to assume his responsibilities on a regular basis, she was paid at the GS-6 level.

To establish a violation of the *Equal Pay Act*, a complainant must show that he or she is receiving less pay than an individual of the opposite sex for work substantially equal in skill, effort, and responsibility under similar working conditions. Both the EEOC administrative judge and OEDCA found that the complainant failed to prove a *prima facie* case of an *Equal Pay Act* violation, as her duties as a Claims Clerk were not substantially equal to those of the PSA in terms of responsibility.

IV

INVOLUNTARY REASSIGNMENT OF VICTIM OF SEXUAL HARASSMENT IN THE INTEREST OF "HARMONY AND PATIENT CARE" FOUND TO BE RETALIATION

(Note: Although this case was previously reported in the Winter 1999 edition of the OEDCA Digest (Vol. II, No. 1), we are presenting it again because of its importance and relevance to the article on employer liability for harassment that appears in this issue of the digest. More specifically, it highlights management's duty not to penalize or otherwise burden the victim of harassment when taking corrective action.

The complainant filed a sexual harassment complaint that included an allegation that the decision to reassign her following the incident of harassment was an act of retaliation for reporting the incident. Following a hearing, an EEOC administrative judge recommended a finding of discrimination on both the sexual harassment and retaliation claims. OEDCA later adopted the administrative judge's recommended decision as the Department's final agency decision.

Following an incident in which the complainant was physically assaulted by a male co-worker in a linen room, management officials reassigned both individuals, rather than just the harasser. The complainant objected to the reassignment, preferring to remain in the familiar surroundings where she had worked since 1984.

The rationale given for reassigning the complainant was to ensure harmony on the ward and good patient care. According to one witness, the reassignment was necessary because of concern that friends of the harasser might subject the complainant to a hostile environment. The witness feared that the complainant's continued presence on the ward under such circumstances would cause problems and adversely impact the patient care environment.

However, the EEO manager at the facility had advised management that the facility's policy and past practice was not to reassign alleged victims of harassment against their will, and that doing so would be construed as punitive and retaliatory. Despite this advice, management reassigned the complainant, asserting that the reassignment did not result in any work-related harm, and that it was not punishment, as both the harasser and the complainant were being treated equally.

In its decision, OEDCA noted that the victim of harassment must not be required to take an involuntary transfer or reassignment, even when the avowed purpose is to further the employer's business objectives. Instead, it is the offending party that must bear the adverse effects resulting from the harassment.

Further, the complainant's reassignment, contrary to management's assertion, adversely impacted the complainant, was viewed by her as punitive, and was the type of response likely to deter a complainant from complaining about sexual harassment in the future. Management, in this case, did more than just fail to take appropriate action in re-

sponse to a sexual harassment complaint. Instead, it penalized the complainant for complaining and, hence, retaliated against her. OEDCA ordered that the complainant receive appropriate, make-whole relief.

V

TEMPORARY MEDICAL CONDITION FOUND NOT TO BE A DISABILITY REQUIRING ACCOMMODATION

The complainant sustained a temporary injury that resulted in damage to the tendons in his right hand, and thereby restricting movement of his right thumb. Because his arm and hand were placed in a cast, he requested an accommodation from his supervisor in the form of a light duty assignment.

The supervisor granted the complainant's request, assigning him to administrative duties that lasted four weeks. At the end of the fourth week, the supervisor informed the complainant that if he was unable to return to his regular duties, he would have to use sick leave, as there was no longer a need for the administrative duties he had been performing.

The complainant used sick leave, but subsequently filed a discrimination complaint alleging that the refusal to allow him to continue performing light duty amounted to a failure to reasonably accommodate a known disability in violation of the *Rehabilitation Act.* According to the evidence in the record, the complainant's impairment lasted only eight weeks.

In its final decision, OEDCA found that the complainant had failed to establish a *prima facie* case of disability discrimination. Specifically, OEDCA found that the complainant had failed to prove that his impairment constituted a disability as defined by EEO law and regulations. To qualify as a disability, the impairment must substantially limit a major life activity. Generally, temporary medical conditions or injuries are not substantially limiting and, hence, are not considered to be disabilities under the *Rehabilitation Act* or the *Americans with Disabilities Act.* As the complainant was not disabled, management was under no obligation to provide an accommodation.

VI

MANAGEMENT'S FAILURE TO TAKE PROMPT CORRECTIVE ACTON RESULTS IN FINDING OF SEXUAL HARASSMENT

The complainant filed a discrimination complaint against her supervisor, alleging that he had engaged in a pattern of sexually harassing behavior over a period of approximately six months. Specifically, she alleged that the harasser would constantly walk over to her desk to flick, touch, or pull her hair. She asserted that she tried, without success, to prevent him from doing it by raising her arm as he approached, and by telling him that his behavior was unwelcome and to stop. She testified that the supervisor once responded by stating, "You know you like me pulling your hair." The complainant responded by saying, "No, I don't."

In addition to the incidents involving her hair, the complainant alleged that the supervisor once grabbed and twisted her arm and, a few days later, grabbed the back of her neck. She stated that when she complained that he had hurt her neck, he replied by stating, "[I]f I was you I would shut up since you're the junior person in the office." The supervisor denied these two incidents, but recalled touching her arm "lightly" on one occasion. He also admitted touching the back of her neck once to get her attention.

OEDCA, as did the EEOC administrative judge who heard the case, had little difficulty concluding that the complainant had been subjected to sexual harassment.

The most disturbing aspect of this case, however, is that several other supervisors witnessed the harassing behavior, but did nothing to prevent it. One supervisor admitted walking away, stating that he had no desire to be a witness to sexual harassment. Another supervisor who had witnessed some of these incidents admitted that the victim had complained to him about the harasser, but that he did nothing to try to end the harassment. Another supervisor testified that she witnessed the complainant to be visibly upset and that she heard the complainant tell the harasser to stop pulling her hair. Another supervisor, to whom the complainant had reported the incidents, jokingly suggested that she "get a stick and hit him with it."

The facility's anti-harassment policy clearly stated that "supervisors at all levels have the responsibility to ensure that employees work in an environment that is free from sexual harassment and to discourage such unlawful conduct." Notwithstanding this admonition, none of the supervisors who witnessed or was otherwise aware of the harasser's conduct took action to remedy the situation. According to the record, they were not disciplined; nor were they counseled regarding how they should handle this type of situation in the future.

Under recent Supreme Court decisions, employers may avoid liability for harassment by supervisors if they can prove a two-prong affirmative defense. First, they must prove that they exercised reasonable care to prevent and correct promptly any harassing behavior. Second, they must prove that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid harm otherwise.

Management in this case was unable to avail itself of this defense. Its anti-harassment policy was clearly not effective in preventing the harassment, even though several management officials were aware of the problem. Moreover, the complainant did what she was supposed to do, which was report the matter to a management official or officials. OEDCA, therefore, ordered that the complainant receive appropriate, make-whole relief.

VII

SIXTEEN MONTH PERIOD BETWEEN COMPLAINANT'S PRIOR EEO PROTECTED ACTIVITY AND HER PERFORMANCE APPRAISAL TOO LONG TO SUPPORT AN INFERENCE OF

RETALIATORY MOTIVE

The complainant had filed EEO complaints on February and May of 1995 against her supervisor. The supervisor, who was aware of those complaints, nevertheless recommended the complainant for a promotion in February 1996. In March 1996, the supervisor gave the complainant an opportunity to submit a self-appraisal for the annual rating period that had just ended in January. The complainant declined to provide the self-appraisal.

In September 1996, the supervisor gave the complainant a rating of "Successful." Dissatisfied with the rating, she filed an EEO complaint alleging that the supervisor retaliated against her because of her prior EEO complaints.

OEDCA found, as did an EEOC administrative judge, that the complainant failed to establish a *prima facie* case of retaliation. The approximately sixteen month period between the complainant's prior EEO activity and the receipt of her performance appraisal was too long to support an inference of a retaliatory motive.[2] Moreover, the fact that the supervisor recommended the complainant for a promotion in February 1996 -- after the complainant had filed two complaints against her -- negates any possible inference that the supervisor retaliated against her in September 1996 with respect to the performance appraisal.

In addition, the complainant presented no evidence that the supervisor's reasons for giving other employees higher ratings were untrue or not worthy of belief. Hence, even assuming the complainant had established a *prima facie* case, she failed to prove that the reasons given for her rating were a pretext to mask unlawful retaliation.

VIII

DISCIPLINARY ACTIONS FOUND TO HAVE BEEN MOTIVATED BY RETALIATION BECAUSE OF THE COMPLAINANT'S PRIOR EEO COMPLAINT; BUT COMPENSATORY DAMAGES DENIED DUE TO INSUFFICIENT EVIDENCE OF CAUSATION

The complainant, a Police Officer in the Police and Security Service, filed a formal EEO complaint in August 1996 regarding his supervisor's conduct. Within the next six months, while his EEO complaint was under investigation, his supervisor disciplined him on two separate occasions for minor infractions. In November 1996, he received a reprimand for being idle while on duty. In February 1997, he received a letter of counseling for not folding the U.S. flag properly.

Shortly after receiving the letter of counseling, the complainant filed a second formal EEO complaint in which he alleged that the issuance of the reprimand and the letter of counseling amounted to reprisal for his prior EEO complaint against the supervisor. The reprisal complaint was consolidated with the earlier EEO complaint for hearing and subsequent processing. Following a hearing on the merits of both complaints, an EEOC administrative judge recommended a finding of no discrimi-

[2] There is no clearly established rule as to what constitutes too long a period to support an inference of retaliation.

nation in connection with the original complaint of discrimination. However, as for the second complaint, the judge concluded that the supervisor had retaliated against the complainant with respect to both disciplinary actions.

OEDCA agreed with and adopted the judge's findings. Although management articulated legitimate, nondiscriminatory reason for its actions, the evidence in the record demonstrated that those reasons were not the true reasons, but rather, were merely a pretext to hide an intent to retaliate against the complainant. The reasons given by the supervisor for imposing the discipline were weak, and his testimony, which was contradicted by other evidence in the record, rendered his credibility suspect.

Furthermore, witnesses established that the supervisor had singled out the complainant for more intense scrutiny, oversight, and criticism than other employees, especially after the first EEO complaint was filed. This scrutiny included a "stake out" and use of a surveillance camera because the supervisor suspected – without evidence or good reason – that the complainant was engaging in criminal activity at the facility. Finally, witnesses testified that the supervisor made negative comments about the complainant's visits to the EEO office and about the EEO complaint process.

OEDCA also accepted the judge's recommendation that the complainant was not entitled to compensatory damages for medical expenses, home repairs, stress, anxiety, mental anguish, and sleeplessness because the complainant failed to show that those expenses and problems were caused by the two disciplinary actions. OEDCA did, however, order the Department to provide the complainant with other appropriate, make-whole relief.

This decision illustrates several important points: (1) supervisors and other management officials must scrupulously avoid retaliating against employees who engage in protected EEO activity; (2) a finding of reprisal is possible, even if the complainant did not prevail in the prior EEO complaint(s) and (3) prevailing complainants will receive compensatory damages only upon sufficient proof that their harms were caused by the discriminatory conduct found to have occurred.

IX

REASONS GIVEN FOR EMPLOYEE'S NONSELECTION FOR POLICE OFFICER POSITION FOUND TO BE A PRETEXT FOR DISCRIMINATION DUE TO EMPLOYEE'S DISABILITY.

The complainant had been employed as a GS-5 Police Officer for approximately three years before taking a voluntary downgrade to a GS-4 File Clerk position to accommodate a medical condition. Prior to taking the downgrade, his performance had always been rated as "satisfactory" or better.

He took the downgrade per the suggestion of his physician, who recommended that he perform less strenuous duties, as he was about to undergo five-vessel coronary artery bypass surgery. Medical documentation in the record indicated that he would have been able to

resume a normal work schedule with no restrictions approximately three months after the surgery.

Approximately one year after his surgery, he applied for a GS-5 Police Officer position that was advertised in an open continuous announcement. His former supervisor, the Police Chief, was the selecting official (SO). Following interviews of the applicants, the SO selected an applicant who, according to the SO, was better qualified because he had more experience than the complainant. The SO denied that the complainant's medical conditions had any impact on his decision, and emphasized that he did not consider the complainant as disabled.

Following a hearing, an EEOC administrative judge recommended a finding of discrimination due to the complainant's disability, and OEDCA adopted the judge's recommendation as the agency's final decision. By the complainant's own admission, he was not disabled. However, even if an employee is not disabled, he or she may be entitled to protection under the *Rehabilitation Act* if there is persuasive evidence that the employee is "regarded as" disabled by the employer.

Although the SO claimed that he did not regard the complainant as disabled, and that the complainant's medical condition had no impact on his selection decision, there was persuasive, direct evidence to the contrary. The complainant and three other witnesses testified that, just prior to the selection action, the SO stated that, as long as he was Chief, the complainant would never be allowed to return as a Police Officer because of his heart condition and the fear that he might have a heart attack on the job. The SO denied making this statement, but the three witnesses who claimed to have heard it along with the complainant had no apparent motive for lying. Thus, it was clear that the SO regarded the complainant as unable to work not only as a VA police officer, but also in the entire class of law enforcement jobs requiring life rescue, safety and fire emergencies; use of physical ability to restrain, apprehend; or transport violent and/or criminal offenders, conducting patrols and ground searches, and emotional stability under stress.

In addition to this direct evidence of discriminatory intent, the administrative judge, and OEDCA, found that the SO's reasons for not choosing the complainant lacked credibility. For example, although he claimed that the selectee had more experience as a Police Officer than the complainant, the record in fact indicated that the complainant had more experience than the selectee. There were also several other instances in which the SO's testimony was contradicted by other reliable and credible evidence in the record.

Thus, the preponderance of the evidence demonstrated that the SO's reasons for not selecting the complainant were a pretext (*i.e.*, not the true reasons) and that the real reason was the complainant's perceived disability. Accordingly, OEDCA ordered the Department to provide the complainant with appropriate, make-whole relief.

This case illustrates the point that an individual may be entitled to the protections afforded by the *Rehabilitation Act*

even if the individual does not have an actual disability—*i.e.,* does not have a physical or mental impairment that substantially limits a major life activity. The *Act* protects not only those who have such an impairment, but also those who are regarded as having such an impairment or who have a record of such an impairment.

X

EEOC GUIDANCE OUTLINES BASIC ELEMENTS REQUIRED FOR AN EFFECTIVE ANTI-HARASSMENT POLICY AND COMPLAINT PROCEDURE

Earlier this year, the EEOC issued comprehensive guidance to employers (including Federal employers) communicating the standards for an employer's liability for unlawful harassment by supervisors. (*Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999).[3] Although the guidance was designed for employers, all employees should become familiar with it, as it clearly explains what employees may reasonably expect from management should they report unlawful harassment.

The guidance was based on two Supreme Court decisions, Burlington v. Ellerth and Faragher v. Boca Raton, involving sexual harassment. However, as the Commission noted, numerous courts have since applied the liability rules established in these two sexual harassment cases to allegations of harassment due to race, color, gender, national origin, age, religion, disability, and engaging in EEO protected activity.

Employers will always be liable for harassment by supervisors when it culminates in a tangible employment action. However, in cases where a supervisor's harassment does not result in a tangible job action, an employer can avoid liability by demonstrating that it exercised "reasonable care" to prevent and correct the harassment and that the employee unreasonably failed to use an available complaint procedure. As the EEOC noted, an effective anti-harassment policy and complaint procedure encourages employees to report harassment before it becomes severe or pervasive, thus enabling the employer to stop the harassment before actionable harm occurs.

While many employers have established policies and complaint procedures to deal with sexual harassment in the workplace, many have not updated those policies and procedures to address other forms of unlawful harassment, such as racial harassment, national origin harassment, *etc*.[4] Until such policies and procedures are in place and being implemented, employers face a significantly greater risk of liability for harassment committed by supervisors.

Employers (and employees) need look no further than the Commission's guidance for those elements that are essential for an effective anti-harassment policy and complaint procedure. Those

[3] www.eeoc.gov/docs/harassment.html

[4] The Department of Veterans Affairs has already updated and disseminated its anti-harassment policy in compliance with EEOC's new guidance.

elements, along with the Commission's explanation, are set forth below.

- **A Clear Explanation of Prohibited Conduct**. An employer's policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, disability, and protected activity (*i.e.*, opposition to prohibited discrimination or participation in the statutory complaint process). This prohibition should cover harassment by anyone in the workplace – supervisors, coworkers, or non-employees. Management should convey the seriousness of the prohibition. One way to do that is for the mandate to "come from the top", *i.e.*, from upper management.[5] The policy should encourage employees to report harassment before it becomes severe or pervasive. While isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful. Therefore, to discharge its duty of preventive care, the employer must make clear to employees that it will stop harassment before it rises to the level of a violation of federal law.

- **Assurances of Protection against Retaliation**. An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints. An anti-harassment policy and complaint procedure will not be effective without such an assurance.[6] Management should undertake whatever measures are necessary to ensure that retaliation does not occur. For example, when management investigates a complaint of harassment, the official who interviews the parties and witnesses should remind these individuals about the prohibition against retaliation. Management also should scrutinize employment decisions affecting the complainant and witnesses during and after the investigation to ensure that such decisions are not based on retaliatory motives.

- **A Clearly Described Complaint Process that Provides Accessible Avenues of Complaint.** An employer's harassment complaint procedure[7] should be designed to encourage victims to come forward. To that end, it should clearly explain the process and ensure that there are no unreasonable obstacles to complaints. A complaint procedure should not be rigid, since that could defeat the goal of preventing and correcting harassment. When an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether it

[5] The head of the VA, -*i.e*., the Secretary of Veterans Affairs - issued the Department's anti-harassment policy. (See *vaww.va.gov/orm/SecretaryWest*)

[6] The Secretary's policy states that the VA will ensure that no employee is subject to retaliation because he or she has alleged or cooperated in the investigation of alleged unlawful harassment.

[7] This complaint procedure should not be confused with EEOC's Federal sector "EEO complaint" process, which employees may also use to complain about harassment.

conforms to a particular format or is made in writing. Moreover, supervisors and managers are obligated to investigate the allegation regardless of whether or not the complaining employee opts to file a formal EEO complaint.[8] The complaint procedure should provide accessible points of contact for the initial complaint. A complaint process is not effective if employees are always required to complain first to their supervisors about alleged harassment, since the supervisor may be a harasser. Moreover, reasonable care in preventing and correcting harassment requires an employer to instruct all supervisors to report complaints of harassment to appropriate officials. It is advisable for an employer to designate at least one official outside an employee's chain of command to take complaints of harassment. Allowing an employee to bypass his or her chain of command provides additional assurance that the complaint will be handled in an impartial manner, since an employee who reports harassment by his or her supervisor may feel that officials within the chain of command will more readily believe the supervisor's version of events. VA employees, for example, may, in lieu of reporting the harassment to a supervisor, report it to any higher level manager, an EEO Counselor in the Office of Resolution Management (ORM), a local EEO Program Manager, the Inspector General, the Office of Civil Rights for the Veterans Health Administration (VHA), the Office of Civil Rights for the Veterans Benefits Administration (VBA), and a union representative (if the employee is a member of a bargaining unit).

- **Assurances that the Employer Will Protect Confidentiality**. An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. However, information about the allegation of harassment should be shared only with those who need to know about it. Records relating to harassment complaints should be kept confidential on the same basis. A conflict between an employee's desire for confidentiality and the employer's duty to investigate may arise if an employee informs a supervisor about alleged harassment, but asks him or her to keep the matter confidential and take no action. Inaction by the supervisor in such circumstances could lead to employer liability. While it may seem reasonable to let the employee determine whether to pursue a complaint, the employer must discharge its duty to prevent and correct harassment. One mechanism to help avoid such conflicts would be for the employer

[8] The reason is that EEOC's Federal sector complaint process is generally slow and inefficient. While it may eventually result in corrective action, it is not well suited to preventing actionable harm caused by harassment. The employer's obligation is to prevent as well as correct such harm. Prevention requires Federal managers to have in place an effective complaint procedure that is separate and apart from the "EEO complaint" process.

to set up an informational phone line which employees can use to discuss questions or concerns about harassment on an anonymous basis.

- **A Complaint Process That Provides a Prompt, Thorough, and Impartial Investigation**. An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment.[9] As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary.[10] For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action. If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses. It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.[11] The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well trained in the skills that are required for interviewing witnesses and evaluating credibility.

- **Assurances of Immediate and Appropriate Corrective Action.** An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer's policy.[12] Management should inform both parties about these measures. Re-

[9] Again, VA managers and supervisors should never rely on, or wait for, the EEO complaint process to satisfy this requirement. Doing so could result in the complained-of conduct continuing, thereby causing actionable harm to occur, and hence, a finding of liability.

[10] The Secretary's anti-harassment policy states that an immediate investigation is required.

[11] In fact, several OEDCA decisions have found management liable for retaliation because of actions that unfairly burdened the complainant.

[12] The Secretary's policy states that the VA will take appropriate disciplinary and adverse action, up to and including removal, against those who engage in harassing behavior or other discriminatory conduct, and those who retaliate against any VA employee who cooperates, participates, or testifies in cases involving alleged harassment or discrimination.

medial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur. These remedial measures need not be those that the employee requests or prefers, as long as they are effective. In determining disciplinary measures, management should keep in mind that the employer could be found liable if the harassment does not stop. At the same time, management may have concerns that overly punitive measures may subject the employer to claims such as wrongful discharge, and may simply be inappropriate. To balance the competing concerns, disciplinary measures should be proportional to the seriousness of the offense. If the harassment was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent, then suspension or discharge may be appropriate. Remedial measures should not adversely affect the complainant. Thus, for example, if it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise). Remedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the harassment. Remedial measures also should correct the effects of the harassment. Such measures should be designed to put the employee in the position he or she would have been in had the misconduct not occurred.